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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

SIOUX NATION OF INDIANS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

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1. Although respondents acknowledge (Br. 86) Congress' plenary power to manage tribal lands for the benefit of the tribe, their primary contention (Br. 40-54, 86-91) is essentially that every valid exercise of this power constitutes a "taking" within the meaning of the Fifth Amendment to the extent that the legislation, with the benefit of hindsight, does not provide "just compensation" within the meaning of the Fifth Amendment. Respondents would require the courts to compare the actual dollar value of the legislation to the tribe, measured with the benefit of hindsight, with the dollar value of the assets transmuted and award the tribe the difference with interest. Under respondents' theory, for example, the public sale of portions of tribal land pursuant to an allotment act is a "taking" to the extent that the price paid to the tribe pursuant to the sale, even a price established by Congress after reasonable investigation, falls below judicially-established values.

Respondents' theory overlooks the special role of the United States in its management of tribal lands. When the United States, as guardian, disposes of such property, it is, in effect, a disposition by the tribe. Whatever may be the situation today, a century ago Indian tribes were deemed incapable of managing their lands in their best interests and that responsibility was exercised by the United States as the fee owner and pursuant to its power to deal with Indian affairs. Even respondents concede (Br. 85) that the United States must be able to manage tribal property to meet educational and other "essential needs" of the tribe. Because a valid exercise of this power is on behalf of the tribe and for what Congress believes is in the best interests of the tribe, it must be deemed a disposition by the tribe and is no more a taking than would be an identical action by the tribe itself, were it freed from historical disabilities. For this reason, the Court has given latitude to congressional judgments concerning tribal welfare and has sustained tribal taking claims only where the legislation could not reasonably be said to promote the welfare of the tribe (see our opening brief at 52-60).[1]

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[1]Contrary to respondents' characterization (Br. 44), we do not contend that any payment, however paltry, must be sustained by the courts as a valid exercise of the plenary power. The question in each case is whether a reasonable basis exists for concluding that the legislation promotes the welfare of the tribe. Normally, no reasonable basis would exist for concluding that a nominal payment for valuable lands promoted the welfare of the tribe.

Respondents are incorrect in their assertion (Br. 37) that the United States has never before argued "in any court" that the plenary power permits Congress to manage tribal property for the overall benefit of the tribe and is not limited solely to maintaining the net worth of the tribe's assets. This was our argument below (Br. 57, 60, 63, 64, 71). (We are lodging with the Clerk a copy of our brief below.) Moreover, this Court has long recognized that "as regards tribal property subject

Contrary to respondents' view (Br. 41-43), this does not provide "less protection" for tribal property than for privately owned property. The prevailing rule simply permits Congress to promote the welfare of the tribe in an essential way that would otherwise be unavailable.[2]

2. In the alternative, respondents adopt (Br. 55-81) the reasoning of the Court of Claims in this case. After essentially abandoning the view that the 1876 legislation was retribution for the Custer massacre (Br. 66-67), respondents argue (Br. 67-68) that "[t]he critical element in the legislative history of the 1876 Act is the fact that, in all of the debate over S. 590 and H.R. 3478, not one

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to the control of the United States as guardian of Indians, Congress may make such changes in the management and disposition *as it deems necessary to promote their welfare*." *Morrison* v. *Work*, 266 U.S. 481, 485 (1925) (emphasis added). See our opening brief at 67-71.

[2]Conceding (see Resp. Br. 7 n.4, 40-41) that the Sioux had "recognized title" to the Black Hills, a property interest protected by the Fifth Amendment (as distinguished from unrecognized or aboriginal title which may be extinguished without compensation, *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 277-278 (1955)), that title was nonetheless subject to management and disposition pursuant to valid exercises of Congress' plenary power. A valid exercise of the power does not, therefore, invade any "property" interest of the tribe within the meaning of the Fifth Amendment.

Nor was it necessary (see Resp. Br. 62) to establish a fund in order to provide fair consideration. The credit of the United States was unquestioned. Moreover, the open-ended commitment to provide food and rations and other material assistance for as long as needed was, in view of the plain inability of the Sioux to support themselves in the foreseeable future, of more value than would have been an interest-bearing fund of, say, $17 million.

member of Congress even mentioned, much less discussed, the value of Black Hills or whether subsistence would be a reasonable substitute for the Sioux Nation's property." The absence of any such remark, however, is hardly determinative of whether Congress intended to provide fair consideration. Our statement (Br. 8-37) sets forth the events leading up to the 1876-1877 legislation, the severe problems facing the Sioux Nation, the various solutions attempted, and the congressional deliberations over the matter. Viewing the legislation in its historical context and according Congress the deference it deserves, it is fair to conclude that the "consideration" referred to by Congress in the 1877 Act (A. 333) was intended as "fair consideration" and that explicit remarks to that effect by members of Congress would have added no more than was already evident in the circumstances.

3. A reply is necessary concerning certain erroneous factual claims made by respondents.

(a) Respondents are clearly wrong in asserting (Br. 15 n.11) that the 1876 Act affected payments still due under the 1868 Treaty. That Act affected only "subsistence" appropriations. See *1942 Sioux*, Finding 17 (A. 232). The court below made no finding to the contrary.

(b) Respondents imply (Br. 23 n.19, 79 n.60) that they were not compensated for their off-reservation hunting rights under the 1868 Treaty. This is incorrect. These same Sioux tribes were given full compensatory credit for those rights in other litigation before the Indian Claims Commission. See *Sioux Tribe* v. *United States*, 23 Ind. Cl. Comm. 358 (1970), and *Sioux Nation* v. *United States*, 24 Ind. Cl. Comm. 98 (1970). See also Defendant's Response to Plaintiffs' Supplemental Brief at 18-21, filed herein on December 14, 1978, a copy of which we are lodging with the Clerk.

(c) Contrary to respondents' assertion (Br. 75-76 & n.53), we do not base our contention that $43 to $57 million was spent on food and rations pursuant to the 1877 Act solely on a concession of Sioux counsel. The United States bases this contention (see our Br. at 36 n.25) on General Accounting Office records. It is nonetheless true that respondents' counsel admitted that $57 million had been paid to the Sioux under the provisions of the 1877 Act when the case was first tried before the Indian Claims Commission. See *Sioux Tribe* v. *United States*, 2 Ind. Cl. Comm. 646, 677 (1954). On appeal the Court of Claims in affirming the Commission's dismissal of the claim noted this concession. *Sioux Tribe* v. *United States*, 146 F. Supp. 229, 234 n.2 (Ct. Cl. 1956). Afterwards, the court vacated its affirmance and remanded the case for further evidence without expressly relieving respondents of this admission. The Commission then held that the United States was liable for a Fifth Amendment taking. See *Sioux Nation* v. *United States*, 33 Ind. Cl. Comm. 151, 216-218 (1974). However, before any trial on the offsets, *i.e.*, payments pursuant to the 1877 Act (see *id.* at 222), the Court of Claims reversed, on *res judicata* grounds, the holding that there had been a taking. *United States* v. *Sioux Nation*, 207 Ct. Cl. 234 (1975). In the interim, Congress enacted the legislation denying "food, rations or provisions" as allowable offsets. Act of Oct. 27, 1974, Pub. L. No. 93-494, 88 Stat. 1500. This virtually eliminated the offset claims because there were few payments under the 1877 Act not in the "food rations and provisions" category. To move the case to completion, the United States presented only abbreviated accounting evidence concerning the allowable items. These isolated items were disallowed as inadequately substantiated. In sum, the United States has had no real

opportunity to establish the full amount of food and rations paid to the Sioux under the 1877 Act, the value of which we contend exceeds $43 million.

CONCLUSION

For these reasons, as well as those stated in our opening brief, the judgment of the Court of Claims should be reversed.

Respectfully submitted.

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Solicitor General

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